STATE OF MICHIGAN
IN THE SUPREME COURT

KERRY JENDRUSINA,

Plaintiff-Appellee,

vs.

SHYAM MISHRA, M.D., and
SHYAM N. MISHRA, M.D., P.C.,
Jointly and severally,

Defendants-Appellants.

Supreme Court No. 154717
Court of Appeals No. 325133
Macomb County Circuit Court
Case No: 2013-003802-NH
Hon. James M. Biernat, Jr.

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PLAINTIFF'S SUPPLEMENTAL BRIEF IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

* * *ORAL ARGUMENT REQUESTED* * *

CERTIFICATE OF SERVICE

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PLAINTIFF/APPELLEE ANSWERS "YES".

STATEMENT OF FACTS

Introduction

This case involves the construction and application of the "discovery rule" applicable to medical malpractice cases under MCL 600.5838a(2). The statute provides that suit is timely if filed, "within 6 months after the plaintiff discovers or should have discovered the existence of the claim".

By Order of May 10, 2017, the Court directed oral argument on the Application for Leave to Appeal filed by Defendant Dr. Mishra.[1] The Court also required supplemental briefing, "addressing whether the plaintiff's complaint was timely filed under MCL 600.5838a(2); Solowy v Oakwood Hospital Corp, 454 Mich 214 (1997)." That subject is addressed in this, Plaintiff's Supplemental Brief As Appellee.

The medical facts are reviewed at pp. 1-9 of Plaintiff's Brief in Response to Application and in the Opinion of the Court of Appeals, Jendrusina v Mishra, 316 Mich App 621, 626-628, 632-634; 892 NW2d 423 (2016). For present purposes, an abbreviated summary suffices to frame the legal issue.

While Plaintiff was under the care of Dr. Mishra, a blood test showed a level of creatinine slightly higher than the normal range, an indication to medical

[1] Suit was filed against Dr. Mishra and his Professional Corporation. This Brief uses the singular to refer to Defendant Mishra.

professionals of sub-optimum kidney function (316 Mich App at 626-627, fn. 2). In 2008, Dr. Mishra diagnosed chronic renal failure, but never told Plaintiff (316 Mich App at 628; Jendrusina dep., pp. 56-57). Instead, Dr. Mishra told Plaintiff that the swelling in his legs was attributable to a weight problem (Id.).

Over the ensuing years, repeated blood tests revealed diminishing kidney function, but Dr. Mishra, an internist, failed to refer Plaintiff to a nephrologist (kidney specialist) (316 Mich App at 624). To the contrary, as Plaintiff's kidney disease continued to worsen, Dr. Mishra repeatedly reassured the patient that his kidneys were fine, with nothing to worry about (Jendrusina dep., pp. 47-48, 51-52, 58, 73).

In January of 2011, Mr. Jendrusina was diagnosed with kidney failure. He had no reason to believe that Dr. Mirsha had committed malpractice (Jendrusina dep., pp. 61-63, 82) ("I didn't know anything was wrong. I thought it happens, it happens").

Plaintiff saw Dr. Tayeb, a nephrologist, on September 20, 2012 and learned for the first time that Dr. Mishra may have made a mistake (Jendrusina dep., pp. 80-84; Jendrusina Affidavit, ¶¶ 3-5). Plaintiff testified:

> "Q. Do you remember when you called [an attorney] for the first time?
>
> A. Shortly after September 20th of 2012 once Tayeb said that, went on and on about 'why didn't your doctor send you to one of us and we could

have kept you off dialysis and maybe never go on dialysis or prevented kidney failure.'

* * *

Q. Do you recall the first time you discussed it with your wife, "I think something might be wrong here"?

A. As soon as I walked out of the office September 20th I gave her a call. I said, "Oh, my God. I think Mishra screwed up."

* * *

A. "Tayeb went on and said, 'Why wasn't your doctor sending you to a nephrologist?' I was shocked, too. I didn't know anything was wrong. I thought it happens, it happens.

Q. All right.

A. I was shocked. So I called my wife after that on the way home. I was dumbfounded. I didn't know what to say. I was totally shocked. And I don't know. So we probably discussed it that night and probably called our friend, Greenup, Ed, within a day, next day or two.

Q. Tell me exactly what you remember Dr. Tayeb telling you at that visit.

A. He came in and what it was, he got full biopsy, not just a short version out of Clinton Henry Ford, out of Detroit. He got that and read through it and reviewed the case and talked to the

> pathologist, I guess, and he goes, 'I got your full pathology report here,' and he goes, 'Did your doctor -- Why didn't you come to a nephrologist?' I said I was with an internist. The internist said everything was fine as long as the creatinine number was down a certain thing, you'd be fine. So he said I need to go. Then he started ranting, saying, 'The doctor should have sent you. I could have kept you off of dialysis. You should have came here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have came to a nephrologist early on.'"

The Course of Legal Proceedings

Suit was filed on September 17, 2013 after expiration of the Notice of Intent waiting period of MCL MCL 600.2912b(1). In essence, the Complaint alleges that Dr. Mishra failed to properly diagnose and treat his patient's worsening kidney disease or refer him to a nephrologist (Complaint, ¶¶ 17-22).

Defendant filed a Motion for Summary Disposition under MCR 2.116(C)(7), contending that suit was barred by the statute of limitations. The parties agree that suit was timely under the "discovery rule" if measured from the September 20, 2012 date[2] on which Plaintiff learned from Dr. Tayeb that Defendant could have prevented dialysis by acting more promptly. They also agree that suit was

[2] The six month period of MCL 600.5838a(2), tolled for the six month Notice of Intent period, MCL 600.5856(c), effectively provide one year from the date a plaintiff "discovers or should have discovered the existence of the claim".

untimely if measured from January of 2011, when Plaintiff suffered kidney failure. The outcome then turns on which day - - January 3, 2011 or September 20, 2012 - - Plaintiff "should have discovered the existence of the claim".

The circuit court adopted the January 2011 date as when Plaintiff "should have discovered the existence of the claim" and therefore granted Defendant summary disposition. The Court of Appeals reversed, holding that September 20, 2012 was the "should have discovered" date. The issue before this Court is when Plaintiff "should have discovered the existence of the claim".

LAW AND ARGUMENT

I. PLAINTIFF'S COMPLAINT WAS TIMELY FILED UNDER MCL 600.5838a(2)

Whether the Plaintiff's Complaint was timely filed under MCL 600.5838a(2) depends on when he "discovered or should have discovered the claim". Plaintiff contends that it was on September 20, 2012, when he was told by Dr. Tayeb that he could have avoided dialysis by earlier treatment by a nephrologist. Defendant contends it was on January 3, 2011, when Plaintiff experienced kidney failure.

A. THE LANGUAGE OF MCL 600.5838a(2) SUPPORTS THE POSITION THAT SUIT WAS TIMELY

1. The Ambiguity Regarding "Whichever is Later"

The relevant statutory language provides:

> "... an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later."

There is ambiguity on the face of the statute regarding the "whichever is later" clause which immediately follows "discovers or should have discovered...".

The common understanding is that the "whichever is later" clause refers back to the "section 5805 or sections 5851 to 5856 or within 6 months" language; i.e. that suit is timely if filed either within "section 5805 or sections 5851 to 5856" or if filed within [the time allowed by the discovery rule] "whichever is later". Under that view, both species of "discovery" - - "discovers or should have discovered" - - are collectively compared to sections "5805 or 5851 to 5856".

An alternative interpretation applies "whichever is later" to the two different "discovery" standards in the immediately preceding clause, "discovers or should have discovered". That analysis allows the suit to proceed, based on "whichever is later": "discovers" or "should have discovered". Here, it is disputed when Plaintiff "should have discovered" but there is no doubt that actual discovery, "discovers", did not occur until September 20, 2012. If "whichever is later" modifies the "discovers or should have discovered" language, the complaint in this case is timely because it was filed within 6 months of "discovers", "whichever is later" as between "discovers or should have discovered".

The second interpretation is favored by the rule of last antecedent. That "rule of statutory construction provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent unless something in the statute requires a different interpretation." Stanton v City of Battle Creek, 466 Mich 611, 616; 647 NW2d

508 (2002); Sun Valley Foods Co v Ward, 460 Mich 230, 237; 596 NW2d 119 (1999); Weems v Chrysler Corp, 448 Mich 679; 533 NW2d 287 (1995).

In this case, the last antecedent before "whichever is later" is "6 months after the plaintiff discovers or should have discovered the existence of the claim". Under the rule articulated by this Court in Stanton, Sun Valley Foods, and Weems, the latter date of when a plaintiff "discovers" or "should have discovered" is the date which commences the 6 month filing deadline. Since Plaintiff "discovered" on September 20, 2012, regardless of when he "should have discovered", suit is timely when "whichever is later" is construed under the rule of the last antecedent.

2. The Judicial Role - - To Construe And Apply A Statute In Accord With Its Plain Language

For the remainder of this Brief, Plaintiff will assume adoption of the conventional interpretation of "whichever is later" - - that both features of the discovery rule ("discovers" or "should have discovered") are together compared to the statutory sections, 5805 and 5851 to 5856. Under that view, the 6 month period begins to run with "should have discovered", regardless of whether "discovers" occurs later. The issue, then, is the meaning of the statutory language "within 6 months after the plaintiff... should have discovered the existence of the claim."

As this Court has stressed so many times, unless there is ambiguity, the meaning of a statute is to be determined from the language chosen by the Legislature, faithfully applied by Judges and Justices constitutionally bound to respect their legislative counterparts. Sun Valley Foods; Velez v Tuma, 492 Mich 1, 16-17; 821 NW2d 432 (2012). The text of MCL 600.5838a(2) is ample support for the Court of Appeals opinion.

Amicus MDTC invokes the threat that doctors will no longer treat Michigan patients if held civilly accountable for their blunders (MDTC Amicus Brief in Support of Application, p. 2). It invokes the "lawsuit abuse" mantra, and cites an article about "defensive medicine"[3] (Id.), as if the role of this Court is to vote its support for a particular political ideology. Similarly, Defendant's Application, p. 10, raises the specter of "fraudulent claims" as the ironic justification to avoid a trial where the true merits of the claim are tested and decided. An ideological approach to statutory construction should be rejected in favor of the established "plain language" jurisprudence. Under the plain language, a suit is timely if filed "within 6 months after the plaintiff discovers or should have discovered the existence of the claim." That is what the Legislature intended.

[3] One may wonder what "defensive medicine" really is. If it is simply good medical practice, protecting against maladies that are rare but devastating, it should be applauded, not derided. If it is medical care which is not necessary or medically justified - - yet, not coincidentally, billed for - - , then it should be honestly recognized for what it is without making the legal profession or courts the whipping boy for distress over high medical expenses.

Defendant and his supporters complain that the Court of Appeals has endorsed a standard that is "subjective" rather than "objective" in nature. It is the Legislature itself which has identified two standards, objective and subjective: "discovers [subjective] or should have discovered [objective] the existence of the claim". Since it is undisputed that Plaintiff did not "discover" the claim until September 20, 2012, the subjective component of the statute is not implicated, just the objective "should have discovered".

3. The Court Should Not Create Judicial Limitations Which The Legislature Did Not Include In The Language of MCL 600.5838a(2)

Defendant and its supporting Amici go beyond the statutory language, asking the Court to make up a "due diligence" requirement not found in the statute (Application, pp. 35-37; Michigan State Medical Society Amicus Brief in Support of Application, pp. 15-16; MDTC Amicus Brief in Support of Application, pp. 6-8). The Legislature knows how to require "due diligence" in its statutes [see e.g. MCL 760.20(3) (notice of alibi defense)]. It decided not to include any such requirement in MCL 600.5838a(2). The Legislature is also able, by statute, to eliminate a "due diligence" requirement imposed under pre-statute case law. People v Burwick, 450 Mich 281, 288-289; 537 NW2d 813 (1995) (production of res gestae witnesses).

That is just what it has done. As in Burwick, it has adopted a statutory framework which does not include "due diligence" as a pre-requisite. The Court should adhere to the principle that it is not at liberty to create limitations, or make up language, that the Legislature chose not to include. Sam v Balardo, 411 Mich 405, 430, fn 29; 308 NW2d 142 (1981); People v Carey, 382 Mich 285, 293; 170 NW2d 145 (1969); In re: Hurd-Marvin Drain, 331 Mich 504, 509; 50 NW2d 143 (1951); TES Filer City Station v MPSC, 310 Mich App 614, 624; 874 NW2d 136 (2015); Etts v Deutsche Bank, 126 F Supp 2d 889, 907 (ED Mich 2015). The Court should reject Defendant's request to make up a "due diligence" requirement which the Legislature opted not to include.

The distinction between "due diligence" and "should have discovered" is subtle yet highly significant. "Should have discovered" looks to what a reasonable patient would conclude based on the medical information provided by the defendant and other treaters, or independently known by the average patient. It is the actual medical knowledge that serves as the measuring stick for whether the plaintiff "should have discovered" the malpractice in light of the known facts.

In contrast, "due diligence" would require affirmative investigatory conduct by the patient. A "due diligence" standard suggests that a patient is not permitted to rely on what the doctor says, and a doctor may mislead the patient with impunity

(concealing the malpractice itself), because the patient is required to conduct independent medical research instead of trusting the medical treaters.

It is with good reason that the Legislature opted for a "should have discovered" standard instead of one requiring "due diligence". This Court should respect that choice and should not make up a "due diligence" requirement having no basis in the statutory language.

Defendants do not limit their invitation to judicial re-writing to making up a "due diligence" standard. The statute looks to discovery of "the claim", yet the Court is requested to change the wording to discovery of, "a possible cause of action"[4], overlooking completely that the phrase "possible cause of action" is not the standard enacted by the Legislature. Instead, the lawmakers look to discovery of the "claim", not "possible cause of action". And, the language adopted by the Legislature looks to the actual "existence of the claim", not its "possible" existence, or to the existence of "a possible claim" or anything of the like. In this respect as well, the Court should base its decision on the statutory language.

4. The Meaning Of The Words Actually Used By The Legislature

[4] The "possible cause of action" language, conspicuously absent from the statute, originated in a case covered by common law, not a statute. See the discussion infra of Moll v Abbott Laboratories, 441 Mich 1; 506 NW2d 816 (1993) and Solowy v Oakwood Hospital, 454 Mich 214; 501 NW2d 843 (1997).

Concentrating on the actual wording used by the Legislature, it is fitting to go through the language word for word. Looking at the actual language confirms that the decision of the Court of Appeals is correct.

First of all, the six month discovery rule period begins to run when either of two events occurs, "discovers" or "should have discovered". Whether this period starts to run with the earlier of the two or later of the two depends on which clause "whichever is later" modifies.

The important point is that these are two different standards, one objective ("should have discovered"), the other subjective ("discovers"). As applied to this case, "should have discovered" is the operant language.

As the Court of Appeals correctly observed, the Legislature chose the word "should have" in describing the standard, not "could have", "might have", or any other alternative term available if mere possibility were enough to start the clock running. Defendant can offer no different plausible interpretation of the Legislature's decision that only "should have discovered" commences the 6 month limitation period. The Court of Appeals committed no error in using the "should have discovered" standard found in the unvarnished language of MCL 600.5838a(2) (316 Mich App at 626, fn. 1).

The Court of Appeals also correctly noted that the "should have discovered" criterion is objective in nature. As such, the focus is on what a reasonable person

in the plaintiff's shoes should have known about the existence of medical malpractice ("the claim") that caused the loss of kidney function. The appellate court committed no error in articulating the meaning of the "should have discovered" test (316 Mich App at 631):

> "An objective standard, however, turns on what a reasonable, ordinary person would know, not what a reasonable physician (or medical malpractice attorney) would know. Thus, the question is whether a reasonable person, not a reasonable physician would or should have understood that the onset of kidney failure meant that the person's general practitioner had likely committed medical malpractice by not diagnosing kidney disease."

The statutory language also addresses what "should have" been discovered. It is "the existence of the claim" that is significant. That phrase has two important components.

First, the Legislature utilized "the existence" to describe the inquiry. It is not "the possibility", "the possible existence" or even the "probable existence" that is important. It is discovery or "should have discovered" the actual "existence" of the claim that matters. Defendant's proposed construction does not respect the Legislature's use of the term "existence" and once more asks the Court to impermissibly make up and insert qualifying or limiting words like "possible" which the Legislature did not use. The Court should adhere to the principle that the judiciary must respect the language choices of the Legislature and cannot read

into the statute limiting words the drafters did not use. Sam; Carey; In re: Hurd-Marvin Drain; TES; Etts.

Secondly, the subject whose existence should have been discovered is "the claim", not "injury", or medical setback, or anything of the like. In a case like this "the claim" means a claim for medical malpractice, the same "claim" the Defendant asks to be dismissed by summary disposition motion. That "claim" is a claim of medical malpractice which requires allegations that the physician's departure from the standard of care was a contributory cause of the injury.

Return now to the language of the statute with the critical terms defined in brackets. Suit may permissibly be filed "within six months after the plaintiff should [more probably than not, beyond simply "could"] have discovered [objective standard of reasonable patient, based on the information provided by treaters and the average patient's independent knowledge] the existence [in fact, not merely possible existence] of the claim [cause of action for medical malpractice, not simply injury; i.e. that medical malpractice was a cause of the injury or medical setback]. That is the meaning which flows from the legislative lexicon choices.

As a working summary of the statutory language, Plaintiff suggests the following. In the absence of subjective discovery in fact, a plaintiff "should have discovered the existence of the claim" when, and only when, a hypothetical

average reasonable patient, possessing the medical information provided by medical treaters and an average patient's own knowledge, would probably determine that he or she had an actual existing cause of action for medical malpractice which caused the injury or adverse medical condition.

B. THE COURT OF APPEALS CORRECTLY FOUND THAT PLAINTIFF'S 2011 KIDNEY FAILURE DID NOT MEAN THAT HE SHOULD HAVE DISCOVERED THAT DEFENDANT'S MALPRACTICE WAS THE CAUSE

The Court of Appeals not only interpreted the statutory language correctly, it applied that language correctly as well. Since there was no evidence of subjective discovery, the issue is whether Mr. Jendrusina "should have discovered the existence of the claim" when he experienced kidney failure in January of 2011 after having been repeatedly assured that the tests revealed no deterioration of kidney function before then.

The appellate court used the correct frame of reference, the objective standard of a hypothetical reasonable patient acting on the medical information provided (316 Mich App at 631). The Court accurately noted the significant medical information provided by Defendant up to that point.[5] As the testimony establishes, Plaintiff was repeatedly told that his kidneys were "okay" or "fine" - -

[5] As the Court of Appeals dissent noted (316 Mich App at 638), citing Solowy, a court is to consider "the totality of the information available to the plaintiff", including "his physician's explanations of possible causes or diagnoses".

in essence that the testing revealed no malfunction for Dr. Mishra to treat at that time, thus no medical error in failing to treat what was represented as needing no treatment.

Defendant's argument necessarily posits that when Plaintiff experienced kidney failure, a reasonable person "should have discovered" the "existence" in fact of a medical malpractice "claim". To do so, Mr. Jendrusina would have to assume that Dr. Mishra had not told the truth to him. According to Defendant, Plaintiff should have known the doctor had concealed his own negligent failure to treat kidney malfunction that Defendant told Plaintiff was not even occurring. The Court of Appeals correctly held that MCL 600.5838a(2) does not allow a negligent physician to mislead the patient, then use that deception to evade civil accountability. And, as the discussion of "due diligence" above shows, the appellate court correctly declined to impose a judge-made requirement to conduct independent medical research to detect the doctor's deception (316 Mich App at 633-634).

In short, the Court of Appeals properly based its decision on the language of MCL 600.5838a(2) (316 Mich App at 626) and correctly applied that language. The Application for Leave to Appeal should be denied or the decision of the Court of Appeals affirmed.

C. THE DECISION OF THE COURT OF APPEALS IS NOT VIOLATIVE OF SOLOWY v OAKWOOD HOSPITAL, 454 MICH 214; 561 NW2d 843 (1997).

Defendant's primary argument is that Solowy v Oakwood Hospital, 454 Mich 214; 561 NW2d 843 (1997) precludes the result reached by the Court of Appeals in this case. As directed by this Court's Order of May 10, 2017, it is appropriate to consider Solowy: its continued vitality, its meaning, and its factual comparison to this case.

1. *Solowy* Should Be Over-Ruled To The Extent That It Substitutes A Judge-Made Standard ("Possible Cause of Action") For The Language Used By The Legislature ("Existence Of The Claim")

The most noteworthy feature of Solowy is that it adopted "possible cause" as the measure of what a plaintiff "should have discovered" (454 Mich at 221-224). In doing so, it adopted that phrase from its earlier decision in Moll v Abbott Laboratories, 441 Mich 1; 506 NW2d 816 (1993).

Moll was a pharmaceutical (DES) liability mass tort action. It was not a medical malpractice case, and therefore did not involve the malpractice discovery statute language at the heart of this case. In fact, Moll involved no statute at all. Instead, the Moll Court adopted a judge-made version of a common law discovery rule using the phrase "possible cause of action" to maintain a policy regarding "the

balance sought between the judicially created discovery rule and the legislatively mandated statute of limitations" (Moll, 444 Mich at 21-22).

In adopting the Moll standard, the Solowy Court was simply in error in overlooking the controlling language of the statute and instead using a judge-made standard that had been created to further a judicial policy. The "possible cause of action" standard adopted from Moll in Solowy should be renounced as inconsistent with the judicial obligation to construe statutes according to the language used by the Legislature.

Solowy was decided more than 20 years ago, by a Court that did not include any of the current Justices. When Solowy was decided, the doctrine of textualism had not yet taken hold. It is understandable under the legal analysis of bygone days that the Solowy Court looked to the judge-made creation of Moll rather than the statutory language. This Court should not make the same mistake.

The critical statutory language looks to whether the plaintiff "should have discovered" "the existence of the claim". Insofar as Solowy used a different judge-made focus, "possible cause of action", rather than the language of MCL 600.5838a(2) "existence of the claim", Solowy should be reversed.

This is especially so since Solowy interprets the phrase, "the claim" as really meaning "a" claim or "a possible claim". Shortly after Solowy was decided, this Court held in Robinson v City of Detroit, 462 Mich 439, 458-462; 613 NW2d 307

(2000), that it must respect the Legislature's use of the article "the" (meaning a single one) instead of "a" (one of many). As in Robinson, "the claim" refers to a single claim sued on, not "a claim" or possible claim. Solowy is at odds with Robinson in looking to "a" "possible" [one of many] claim instead of the single "the" claim brought in the malpractice suit.

2. The Legal Analysis Of The Court of Appeals Is Not At Odds With That of *Solowy*

Even if this Court believes it appropriate to substitute a judge-made "possible cause of action" standard for that of legislators, the Court of Appeals decision is correct. The Jendrusina panel was fully aware of Solowy and discussed that decision at length, finding it legally and factually distinguishable (316 Mich App at 629-631, 633). The Court of Appeals was correct on this facet of the case.

Solowy focused on what the Plaintiff "should have discovered", a "possible cause of action" said the Court. The Court of Appeals in this case applied that standard.

The critical issue here is different than "what"; it is instead the meaning of "should" in determining the level of certainty demanded (316 Mich App at 626, 633-635). The Solowy Court never even considered, much less decided, the significance of the Legislature's use of "should" rather than "could" to identify the

level of certainty. There is no conflict at all between the two cases on the meaning of "should".

A hypothetical fact situation may help illustrate that "should" and "possible cause of action" are two different standards addressing two different features of the discovery statute. Assume that the patient experiences an untoward medical setback, such as an infection that surfaces at the hospital. There are multiple possible causes: (1) an infection that was sustained prior to admission that was asymptomatic until after admission, (2) transmission by a family member visiting in the hospital, (3) one sustained from another patient despite the best of care, or (4) because a hospital employee failed to sterilize medical equipment that had previously been used by an infected co-patient.[6] In accord with this assumption, only the fourth possibility would give rise to a medical malpractice claim. Assume further that the statistical probability is that, for every one thousand such infections, 648 are attributable to pre-admission exposure, 311 are caused by contact with family members, 29 are from other patients and 2 are from the failure to sterilize.

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[6] If one expands the range of "possibility" other remote "possibilities", which cannot be disproved with certainty, may emerge. As an unlikely but "possible" cause, the patient's room may have been surreptitiously entered while he was sleeping by an enemy of a patient staying in a different room across the hall. The would-be assassin mistakenly administered to the plaintiff an infected needle intended for the enemy across the hall. To quote common wisdom, "anything is possible".

In a case such as that, one might say that malpractice was "a possible cause" within the formulation. However, whether the patient "should have discovered the existence of the [malpractice] claim" in light of the comparative probabilities is a different question. One might fairly say that malpractice was "a possible cause" but that does not mean that the plaintiff "should have discovered" this unlikely but possible cause. As this discussion suggests, whether malpractice is one of multiple possible causes is a different issue than whether the patient "should have discovered" it. The fact that Solowy addressed one of these issues, possibility of causation, does not make it inconsistent with the appellate court's Jendrusina decision regarding the degree of certainty ("should").

That, in a nutshell, is a major fallacy of Defendant's argument. It takes the word "possible" out of Solowy's description of the range of causation possibilities and asks this Court to export that term into the "should have known" test. Regardless of whether "possible" is an apt judge-made non-statutory definition of "existence of the claim", Solowy does not make that term displace the Legislature's use of "should have discovered" instead of "could have", "might have" or "could possibly".

3. The Facts of This Case Are Significantly Different Than Those of *Solowy*

Even if one accepts without question the non-statutory "possible cause of action" criterion of Solowy, the outcome is unchanged. Whatever the meaning of MCL 600.5838a(2), application of the statute is necessarily fact-specific, and the ultimate outcome must turn on the unique facts. The Solowy Court acknowledged this when it cautioned, "there may be circumstances where the six-month period will not begin to run until a more definitive diagnosis is obtained" (Solowy, 454 Mich at 216). Comparison of facts in this case with those of Solowy shows why there are different outcomes.

In Solowy, the plaintiff discovered a lesion similar to, and in the same location, with the same symptoms, as one that the defendant was to have removed previously. She was explicitly told that there were two possible causes: the lesion was cancerous because the doctor had not fully removed the cancer in the earlier operation, or it was a non-cancerous condition that coincidentally occurred at the former cancer site (454 Mich at 217). About two weeks later, the condition was confirmed to be recurrence of the cancer. Suit was filed within six months of when the definitive cancer diagnosis was made but more than six months after the patient was told that recurrent cancer was one of two possibilities.

In this case, by contrast, Plaintiff was not told in January, 2011 that his kidney failure may have been ignored by Dr. Mishra. Unlike the plaintiff in

Solowy, Mr. Jendrusina was not specifically advised on the date advocated by Defendant that one of the possible causes was the doctor's failure to properly treat.

Furthermore, there is no suggestion in Solowy that the doctor misled the patient as here. It is one thing to suggest that a patient "should have discovered" when presented with two articulated possible causes, one of which arises from malpractice (Solowy). It is another thing altogether to contend that Plaintiff Jendrusina "should have known" of a malpractice claim when he was not told in January of 2011 that malpractice was one possible cause and had been repeatedly told previously that he was not experiencing progressive kidney shutdown. Even under the Solowy legal framework, the critical facts are significantly dissimilar, as the appellate court correctly recognized (316 Mich App at 629-634).

RELIEF SOUGHT

WHEREFORE Plaintiff KERRY JENDRUSINA prays that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully submitted,

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